No. 4481

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN,
Appellant,

vs.

MARY N. LUCAS et al.,
Appellees.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLEES, JANET M. SCOTT, RUBENA F. SCOTT and BISHOP TRUST COMPANY, LIMITED, Their Guardian

E. A. Mott-Smith,
Attorney for Janet M. Scott, Rubena F. Scott,
and Bishop Trust Company, Limited,
their guardian, appellees.

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I.

These respondents demurred to the amended bill of complaint of petitioner filed herein with the Circuit Judge of the Fifth Circuit, Territory of Hawaii, alleging various grounds of demurrer which grounds of demurrer were together with the demurrers of other respondents herein all and each and every one of them sustained by the Circuit Court of the Fifth Circuit, Territory of

Hawaii. The case then went on appeal by petitioner to the Supreme Court of the Territory of Hawaii, and the demurrers of respondents, including these, sustained on two grounds mainly, that is multifariousness and adequate remedy at law. The matter now comes to this Court on appeal by petitioner from the decree of the Supreme Court of the Territory of Hawaii.

A complete statement of the case may be found in the opinion of the Territorial Supreme Court (Tr. pp. 134-144).

These respondents demurred on thirteen grounds (Tr. pp. 108-112).

Inasmuch as several of the other respondents demurred, upon similar as well as other grounds especially the Lucases (their brief pp. 1-5), this brief will be confined to the following grounds set forth in the demurrer below of these respondents. It is urged however that inasmuch as one or the other of the respondents have together taken up with these respondents all the points of demurrer of these respondents as well as separate demurrers of separate respondents that this Court pass on all the points of demurrer presented in the several briefs of respondents and to this end and for the assurance of these respondents the brief for respondents Mary N. Lucas and Charles Lucas, and the brief for respondent of Kilauea Sugar Plantation Company, are hereby adopted and made a part of this brief.

1. The amended bill of complaint does not set forth sufficient nor any facts to entitle the petitioner to any relief in equity.

3. Petitioner, if he has any remedy at all, has a full, adequate and complete remedy at law.

4. The amended bill of complaint is multifarious.

5. That there is now pending another suit between petitioner and these respondents, concerning the same matters and things alleged in the amended petition.

9. Catherine Scott having deceased, and the estate of which she was seized being now vested in her children, they cannot now be divested of their said estates.

Grounds 1, 3, 4 and 5 of this demurrer may be argued together.

We agree with and adopt the reasoning and contentions of counsel for respondents, Mary N. Lucas and Charles Lucas as to misjoinder of defendants, multifariousness, action pending at law, no jurisdiction to construe will, laches, remedy at law, trial by jury, no equity in bill, tender, and their comments on *Sharon vs. Tucker*.

We also agree with and adopt the reasoning and contentions made by counsel for Kilauea Sugar Plantation Company, that appellant did not perform the condition imposed by Clause III of his father's will and because of his conduct could not perform that condition nor carry out the true intent of his father's will.

Assuming as we must, for the purpose of the demurrer, that the amended petition states the true state of conditions existing between petitioner and respondents, for which petitioner is seeking remedies in this suit, we find that the suit is directed chiefly against the following classes of respondents:

Class 1. Mary N. Lucas and her husband, Charles Lucas.

Class 2. Janet M. Scott, Rubena F. Scott, and Bishop Trust Company, Limited. This class we will hereafter refer to as "the Scott minors."

Class 3. L. L. McCandless, Noa W. Aluli, and John C. Lane.

Class 4. Kilauea Sugar Company.

The grievance of petitioner against these different classes of respondents and the prayers for relief against them may be briefly stated as follows:

Class 1. The 7/9 undivided interest in the lands involved in this controversy, claimed by Mary N. Lucas (i. e. 5/9, acquired by her from five of the daughters of the late C. Bertelmann, and 2/7 acquired from two of the shortcoming sons) was divested from Mary N. Lucas and vested in petitioner on October 30, 1916, when petitioner performed the conditions of his father's will by making due and legal tender to Mary N. Lucas of $35,000.00 or $5,000.00 for each of the 1/9 interests claimed by her.

Since October 30, 1916, therefore, Mary N. Lucas has been wrongfully in possession of the lands of petitioner, taking the rents thereof which amount to $42,000.00.

Petitioner therefore prays:

(a) That Mary N. Lucas be required to keep from the rentals collected by her since October 30, 1916, the sum of $35,000.00, the same being the amount that petitioner is required and did offer to pay to her on October 30, 1916, in order to divest her of her 7/9 interests.

(b) That Mary N. Lucas be required to convey and quit claim to petitioner, said 7/9 interests.

Another ground of complaint against Mary N. Lucas is that she is asserting title to the 1/9 interest in the land originally inherited by petitioner under his father's will. Mary N. Lucas claims to have acquired this 1/9 interest under an execution sale on the 7th day of February, 1903. Petitioner alleges that this sale was void because it was made upon a judgment which was void because by implication no service of process was ever made upon him in the suit on which the judgment was based; also because the price realized for the land under the execution sale was grossly inadequate; also that the right, or executory devise, which petitioner owned in said lands, was not then subject to be sold.

Petitioner alleges that said purported deed is a cloud upon his title and prays that the same may be cancelled and set aside.

As another ground of complaint against the respondent, Mary N. Lucas, it is alleged that on August 13, 1902, petitioner mortgaged his 1/9 interest to Mary N. Lucas to secure a loan. Under the terms of the mortgage the mortgagee was to receive petitioner's share of the rents and apply the same towards the payment of the mortgaged indebtedness. This mortgage has never been foreclosed, and the rents collected by Mary N. Lucas have amounted it is alleged to more than sufficient to satisfy the loan.

Petitioner therefore prays that Mary N. Lucas be required to account to petitioner for the rents received.

Class 2. The Scott minors.

Catherine Scott having died prior to the expiration of the lease to Kilauea Sugar Company, the estate that had vested in her became vested in these minors. Although petitioner was not required by the terms of the will to pay these minors anything to divest them of their estates and to vest the same in petitioner, petitioner says he did make tender of $5,000.00 on the Bishop Trust Company, Limited, guardian of these minors.

By reason of such tender the estate of said minors in a 1/9 undivided interest in the land was divested and became vested in petitioner. Notwithstanding the divestment of their estates, the minors have wrongfully remained in possession and collected rents amounting to $6,000.00.

While petitioner was willing to pay the minors $5,000.00, although he did not consider them legally entitled thereto, he is not now willing to pay them that sum unless the court should find that they are legally entitled thereto.

He therefore prays:

(a) That the court determine whether as a matter of law these minors are entitled to be paid $5,000.00.

(b) If the court shall find they are entitled to be paid $5,000.00, the minors should be required to keep $5,000.00 out of the $6,000.00 rents they have wrongfully collected, the same being the $5,000.00 that petitioner should pay and did offer to pay under the terms of the will; and

(c) The minors should be required to convey and quit claim their 1/9 undivided interest to petitioner.

Class 3. L. L. McCandless, Noa W. Aluli and John C. Lane.

The complaint against this class of respondents is to the effect that, in his efforts to obtain the $40,000.00 needed for payment of the 8/9 interest, he went for assistance to Lane and Aluli, who, in turn, engaged the assistance of McCandless. McCandless financed petitioner, and the $40,000.00 was contributed by him. As a consideration for this assistance, petitioner conveyed an interest in the lands to McCandless and another interest to Lane and Aluli. The assistance given by Lane and Aluli was slight and inefficient, and the risk assumed by McCandless was little, and the only reason that petitioner agreed to make these conveyances was because of his dire necessity. The bargain thus forced upon petitioner was unconscionable, and the Court should find that, although these conveyances upon their faces appear to be deeds, they are in fact mortgages.

Prayer that the deeds to McCandless, Lane and Aluli should be set aside and petitioner should be required to pay McCandless what is due him under the mortgage and Lane and Aluli what their services are reasonably worth.

Class 4. Kilauea Sugar Company.

Against this respondent, petitioner alleges that it has been in possession since the estates of Mary N. Lucas and the Scott minors were divested, and is therefore liable to petitioner for the use of the lands which petitioner alleges to be $100,000.00 and for which he prays judgment.

II.

ATMOSPHERE OF THE CASE.

The rights and estates of all who took under Bertelmann's will have been fixed and determined by two proceedings before the Territorial Supreme Court and one proceeding before the Ninth Circuit Court of Appeals. There is now no question of the quantity of estate or nature of right taken by any and all of those persons the will of Bertelmann seeks to benefit. The six daughters of the testator surviving at the death of the testator took vested estates of one-ninth each. The three sons surviving the testator each took similar estates. The estates thus given the sons and daughters were however subject to be defeated if one or more of the sons conformed to the condition subsequent proviso of the will. This provision is found in clause III of the will. If none of the sons so conformed then the major part of the estate under clause IV was to be equally divided among sons and daughters and their heirs by right of representation.

The real and only question in this case is whether any of the sons have conformed to the proviso of clause III of the will. Two of the sons admittedly have not so conformed. The remaining son Henry, the petitioner herein, has attempted to do so but has he done so? Can he convince a court of equity that he has done so?

By and large the testator entertained the hope, a hope more paramount than the future well-being of his female issue, that one or more of his male issue would carry on the estate the testator had won and devised not for the benefit of a stranger or strangers but in advancement of

family name—family advancement as represented in male issue. The testator did not desire that the patrimony should be shared with strangers, nor that the patrimony should be the subject of spoils. Rather than this he desired that if all his sons failed, the property should be divided equally among all his children who survived him not excluding grandchildren by right of representation, as provided in clause IV of his will.

Henry Bertelmann has failed to conform to the wish and hope of his father. His brothers failed before him. The father's plan has been wrecked not through any provision the father has made in the will but through the act of the sons—and particularly the last of the failing sons—Henry, the petitioner in this case. And the father had the prevision to provide in clause IV of his will that in case of such failure his natural wish and intent be carried out, the division of the property equally among his sons and daughters and their heirs by right of representation.

And now Henry comes into a court of equity and asks relief but upon what record. At the time of his father's death and under the terms of his father's will he possessed two things under certain provisions of his father's will—one a vested estate in one-ninth in the bulk of his father's property and two, a right or privilege to become vested in and with nine-ninths of the same property by doing certain things prescribed by clause III of the will.

What was the first thing he did in an attempt to conform to his father's fond and exclusive wish and desire. Not long after the death of his father he mortgaged his one-ninth (or as it was then conceived his one-third

interest) and with it his privilege or option under clause III of the will. He began shortly after his father's death to conform to his father's wish by mortgaging his birthright. He followed that, a little later, by allowing an execution to be taken on his birthright by which he was deprived thereof so it appeared at the time and did not otherwise appear till fourteen years later when by judicial interpretation of his father's will (Lucas vs. Scott minors decision of this Court in 239 Fed. 450) it was ascertained that not only had he not parted with his birthright but that he could not part with his birthright, that his birthright was not assignable, that the privilege or option which he had was non-assignable. Yet he tried to part with it soon after his father's death.

After so mortgaging his birthright in 1902 and allowing the same to be sold on execution in 1903, he permitted the situation or condition, hopeless by his own acts of non-conformity with his father's wish, to run along fourteen years till 1916. On November 15, 1915, the one year period began to run within which any one or more of the sons of the testator could exercise the privilege accorded any one or more of them under clause III of the testator's will.

What was the situation at that time? The testator had nine children. Seven of them, five daughters and two sons, had improvidently sold their birthright to Mary N. Lucas. The eighth, Henry Bertelmann, the petitioner in this case, had mortgaged his birthright to Mary N. Lucas, and had permitted Mary N. Lucas fourteen years previously to purchase what was left of that

birthright on an execution sale. The ninth, Catherine, had not parted with her birthright. Therefore it appeared in the light of that day that all the Bertelmanns had parted with their interests except Catherine. But Catherine having shortly theretofore died and Mary N. Lucas having concluded, though erroneously as it afterward turned out, through this Court's decision as reported in 239 Fed. 450, nevertheless in the light of that day Mary N. Lucas concluded that she had acquired not only the vested interest of all of the eight others than Catherine, of Christian Bertelmann's children but the privilege conferred in Art. III of the will on all or on one or more of the three sons and in consequence thereof made a tender on the minor children of Catherine and on their guardian, the Bishop Trust Co., Ltd., as a basis of a claim to defeat the vested estate of Catherine and of her minor children acquired under her father's will, said vested interest being fixed and determined by this court in the Kahilina case. The issue was submitted to the Supreme Court of the Territory of Hawaii (Scott vs. Lucas, 23 Haw. 338, and to this Court, 239 Fed. 450) upon a submission of facts as between said minors and Mary N. Lucas resulting in the decision of the Territorial Supreme Court that the condition of performance as provided in clause III of the will became impossible of performance through the death of Catherine and hence Mary N. Lucas could not defeat the estate which had vested in Catherine's children—the Scott minors; and resulting in a decision of the Ninth Circuit Court of Appeals that while not disaffirming the decision of the Territorial Supreme Court as to impossibility of per-

formance and citing many authorities as to literal conformance with a condition subsequent which would divest a present vested estate may be an indication of this Court's thought on the point of impossibility of performance, decided that the privilege accorded the sons was a personal one and one not assignable to strangers of the family, a point which the Territorial Supreme Court found unnecessary to pass upon in view of the fact that it found that impossibility of performance was sufficient to determine the case. The decision referred to, of the Ninth Circuit Court of Appeals, informed Mary N. Lucas in no uncertain terms that she could not divest the heirs of Catherine on the ground of non-assignability of the privilege as had the decision of Territorial Supreme Court informed Mary N. Lucas that she could not divest the heirs of Catherine for the reason that through Catherine's death the condition became impossible of performance—a matter which has become *stare decisis* since 1916.

The decision of the Ninth Circuit Court of Appeals breathed new life into the breast of Henry Bertelmann after 14 years of somnolence. He suddenly discovered that it was impossible for him to mortgage or sell or part his birthright, his right to perform, because his father had so pre-determined for him.

Then and in the light of that what did he do? The day before the last day of the period in which he could perform he entered into an alleged unconscionable bargain to the detriment of the only daughter Catherine who was true to the family hope. He bartered his birthright with a stranger—entered into an actual agreement with a stranger or strangers, McCandless, Aluli and

Lane, that the estate should be treated as spoils and agreed that the spoils should be divided between them. And now this man, now that the "thieves" have fallen out (I am speaking metaphorically), the petitioner in this case asks this court to do him equity.

III.

ADEQUATE REMEDY AT LAW.

From an examination of the amended petition, it is clear that if the allegations therein are true, with respect to performance under clause III of the will, the petitioner would have a full, adequate and complete remedy at law against the Lucases and Scott minors and their tenant the Kilauea Sugar Plantation Company, who are in possession.

If the facts set forth in the amended petition are true in this respect there can be no question but that an action of ejectment or a statutory action to quiet title would give petitioner full, adequate and complete relief.

Under the facts pleaded, these respondents are either lawfully seized and possessed of an undivided one-ninth interest in these lands and as such are legally entitled to receive and enjoy one-ninth of the rents, issues and profits derived from the same, or they are wrongfully in possession of said lands and, since the 30th day of October, 1916, have been wrongfully receiving a 1/9 share of the rents.

Were plaintiff to bring an action at law against these respondents the issues would be plain, the remedy simple,

and the cause confined to performance under clause III of the will.

In such a case the questions involved would be few. Petitioner in his petition has set forth that Catherine, the mother of the Scott minors, was seized of a 1/9 undivided interest and that, upon Catherine's death, that interest was inherited by her minor children. Had Catherine not died the interest of which she was seized might have been divested by the payment to her of $5,000.00 within one year after the expiration of the lease to Kilauea Sugar Company. The only questions, therefore, that would have been presented in an action of law would have been—

(a) Was the estate of these minors defeasible by the payment to them of $5,000.00; and

(b) Did petitioner pay, or make a lawful tender to pay, these minors the sum of $5,000.00 within the prescribed time under clause III of the will.

If both of these questions were on joined issue answered in the affirmative, judgment would be for petitioner for the recovery of the land wrongfully withheld, together with damages for the wrongful detention, which damages would be the rents illegally collected by these respondents.

And these respondents would not be required to quit claim their interests to petitioner for they would have no interest to quit claim. If the allegation of petitioner that the estate of these minors was divested and became vested in him is a correct statement of the law, these respondents have been and are now nothing but mere trespassers.

From the amended petition, the outstanding claim of petitioner is that, because he has performed the condition subsequent contained in clause III of his father's will, the estates that had vested in his brothers and sisters and their heirs and assigns have been divested by his tender and petitioner is now seized in fee simple of the lands in question, but those persons, notwithstanding that their estates have been so divested, continue wrongfully in possession and refuse to yield possession to petitioner.

His case against the Scott minors is under the will of his father and with respect to that he has a complete remedy at law.

And petitioner has himself recognized that, as against these respondents, he has a full, adequate and complete remedy at law for, as shown by his amended petition, he has now pending an action of law against these respondents for the recovery of the lands that are involved in this proceeding, a suit which he is afraid to prosecute because by his own acts he has imbroiled himself with others.

Upon that state of facts the main case of petitioner is predicated! It happens, however, that in the course of his transactions concerning these lands, petitioner has entered into obligations with McCandless, Lane and Aluli, which he now finds onerous, matters of his own doing in which the Scott minors have had no participation, and which he asserts were forced upon him because of his straightened circumstances. These parties respondents who are in possession of the lands to the extent of a one-ninth interest under their grandfather's will

claiming to be vested in fee of the same, have no interest nor connection in the remotest degree with the controversy between petitioner and McCandless, Lane and Aluli, nor with petitioner's imbroglio with the Lucases with respect to petitioner's mortgage to them or the rights they acquired under an execution sale.

The Scott minors have the constitutional right to have a trial by jury, so far as their interests are concerned yet petitioner contends that because he has one right of action against the Scott minors to recover possession of their interest under their grandfather's will in lands and another right of action against McCandless et al. to have certain instruments set aside, and against Mary N. Lucas for accounting, etc., he may join these actions in one, go into a court of equity and be awarded several different kinds of relief, and thus deprive the respondents, the Scott minors, of their constitutional rights.

(See authority cited by counsel, A. G. M. Robertson, for Mary N. and Charles Lucas—his brief pp. 50-56. The person who wrote that brief was formerly Chief Justice of the Supreme Court of the Territory of Hawaii; and, may I step aside for a further pleasantry, the person who wrote the brief herein for the Kilauea Sugar Plantation Company is W. F. Frear, seven years Chief Justice and nearly seven years Governor of this Territory.)

IV.

MULTIFARIOUSNESS.

Multiplicity of actions is defined by Bouvier to be "Numerous and unnecessary attempts to litigate the same right."

Assuming that the allegations in petitioner's amended petition are all true, it would not be necessary for petitioner to bring "numerous and unnecessary attempts to litigate the same right."

According to his petition, petitioner has a right to recover possession of the lands from those whom he alleges are in possession together with damages for the detention thereof. It would not therefore be necessary to bring numerous actions, for one action at law against those in possession would be all that was necessary to determine who was entitled to possession.

It is true that courts of equity sometimes assume jurisdiction of a case to avoid a multiplicity of suits where it appears that there is one general right to be established against a great number of persons, but in the case at bar there is not one general right to be established against the various respondents.

"In the main, however, it seems to be now generally admitted that multiplicity does not mean multitude, and that equity will not interfere where the object is merely to obtain a consolidation of actions, or to save the expense of separate actions. Some community of interest in the various adversaries sought to be joined in one equitable action must exist to warrant such interference."

R. C. L. Vol. 10, page 282. Section 27.

There certainly is no community of interest between the respondents Lucas and the Scott minors and the other respondents, McCandless et al. The former respondents are in nowise interested nor concerned in the matters alleged against the latter respondents, and, should this action proceed to trial, these two classes of respondents would not resort to nor have similar defenses.

We submit that if ever a bill in equity offended against the rule against multifarious pleading, the present bill is a good illustration. Here we have visited upon these Scott minors a complaint that contains forty-seven pages of matter as to which they are not interested in anything that could not readily have been pleaded in one or two pages.

As already pointed out, the whole of petitioner's complaint against these respondents is that they are wrongfully in possession of the land of petitioner. For the settlement of this question these respondents have the constitutional right to a trial by jury, and petitioner has a full, adequate and complete remedy at law.

Under what theory then can these respondents be deprived of their right of trial by jury and be compelled to join in vexatious litigation concerning other parties with whom they have no community of interest?

What interest have these respondents in the alleged right of action of petitioner against McCandless, Lane and Aluli, and why should these respondents be put to the annoyance and unnecessary expense of defending against matters with which they have no connection?

The test of multifariousness is well stated in note *3 page 196, Vol. 14, Enc. P. & P.* thus:

"Where there is a demand of several matters of a distinct and independent nature in the same bill, rendering the proceeding oppressive because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleading with the statement of the several claims of the other defendants, with which he has no connection"—

See Alexander v. Alexander, 85, Va. 353.

See also *Enc. P. & P. Vol. 14, page 197,* the definition given for multifariousness:

"The improper joining in one bill of distinct and disconnected matters, and thereby confounding them."

V.

MISJOINDER.

As has already been remarked, in the amended petition there has been an improper joining of many distinct and disconnected matters. This is apparent on a glance at the very title to the amended petition, which is called, a bill to (1) Remove Cloud from Title to Land, (2) For an Equitable Accounting, (3) For Cancellation of Instruments, (4) To Compel Reconveyance and Delivery of Possession, and (5) For other and Incidental Equitable and Legal Relief Necessary To Remove Cloud From and To Quiet Title to said Land.

The amended petition itself shows (1) that these respondents (the Scott minors) have cast no cloud upon the title to these lands, (2) neither is an Equitable Accounting due nor prayed for as between these respond-

ents and petitioner. (3) No instruments are of record that affect the relationship between these respondents which require cancellation, nor is any such relief prayed for as against these respondents. (4) Nothing has been conveyed to these respondents, hence there is nothing for them to "Reconvey," and the only part of this long complaint as suggested by the title, with which these respondents might be in any way connected or concerned, is called "Delivery of Possession."

VI.

LUCAS VS. SCOTT ET AL., 23 H. 338.

Catherine Scott having deceased, and the estate of which she was seized being now vested in her children (the Scott minors) these children cannot now be divested of their said estate.

If this court should be of the opinion that the amended petition has set forth sufficient facts to entitle petitioner to relief in a court of equity, that the relief that might be afforded petitioner at law is not full, adequate and complete, that the amended petition is not bad for multifariousness, and that the demurrer should not be sustained by reason of the fact that there is another suit pending between the parties in which the same questions of law are involved, there remains a controlling reason why the demurrer of these respondents should be sustained, viz, the fact that, as appears by the pleadings, Catherine Scott in whom a 1/9 undivided interest was vested, has died, her interest has been inherited by her

minor children, and that interest cannot now be divested.

In the case of *Bertelmann* v. *Kahilina* reported in *14 H. 378,* and referred to in paragraph 3 of the amended petition, petitioner and Henry, his brother, brought an action in the Supreme Court of this Territory against their mother and several of their sisters (not including Catherine) for the construction of the will of C. Bertelmann, deceased. The questions involved in that proceeding were (1) what estate in these lands did the widow take under the will? and (2) what estates did the children take under said will?

The court specifically answered these questions by holding in the following language that:

"The widow has a life estate in one-third of the land, subject to be divested by the performance of the conditions prescribed in the third item, in which case she will thereafter have a fixed sum of $2000.00 a year, which will be a charge on the land.

The children have equal vested estates in fee, subject to the widow's interest, defeasible as to the interests of the daughters and shortcoming sons upon the performance of the prescribed conditions by the other son or sons, the sons having meanwhile contingent executory devises as to such interests."

Petitioner in his amended petition says that the above holding by the Supreme Court is the law of this case and we agree with him.

Petitioner, however, in paragraph 3 of his amended petition says that in the above case the court held that—

"each of the estates of said daughters and shortcoming sons would be divested from them and, *if any were not surviving at said time, from his or her heirs or assigns, and* vest in the son or sons performing the conditions

prescribed upon the performance thereof by one or more of said sons."

This is an incorrect statement, for the Supreme Court did not nor indeed could not have made any such holding.

The court made no reference in its holding to the *heirs* of any deceased sister nor was that question before the court for there are no "heirs" to the living and when that decision was rendered none of the sisters of petitioner had died. The question whether the sons were required to pay $5,000.00 to the heirs of a daughter who did not survive the expiration of the lease was not before the court for consideration. It was not in fact considered, either elaborately or scantily. Not a word of discussion on the subject is to be found in the Kahilina decision. The holding of the court, as we have said, in no way referred to "heirs," the exact language of the court being—

"defeasible as to the interests of the daughters and shortcoming sons." (not a mention of "heirs.")

It is true, and petitioner's counsel seems to make much of this point, that the learned Chief Justice in stating the questions presented and reasoning thereon, stated by way of supposition that the performance of the prescribed conditions by the sons might "divest the daughters and shortcoming sons or their heirs," but such a statement is mere dictum and falls far short of being a holding to that effect. The *holding* of the court is in the exact language we have set forth, which was of course entirely correct, for in that proceeding the interest that the heirs of a deceased sister might take in the estate were

not, nor could not be involved. The only interests that the court was concerned with, or for that matter, in which any person was then concerned, were the respective interests of the widow and children, all of whom were then living.

It is of course elementary that the decision of a court is only authority on points which were at issue, and in Bertelmann v. Kahilina, the question as to the rights of "heirs" of deceased persons was certainly not in issue.

Paragraph 3 of the amended petition makes mention of the case of Lucas v. Scott et al., which is reported in 23 H. 338. In that case the question of the rights of the heir of a deceased sister was squarely presented for judicial determination.

The petitioners in that case were the present respondents (Scott minors), the respondent being Mary N. Lucas who is one of the present respondents. It is true that petitioner was not made a party to that case and the question involved is not res judicata as to him.

The decision of the court in that case, however, in stare decisis, and settles the law as to the rights of the heirs of Catherine Scott, for that was the precise question involved.

In that case, the contention made by the respondent that, because of the death of Catherine Scott, before the expiration of the lease to Kilauea Sugar Co., her minor children (Scott minors) had no interest in these lands, was not upheld by the court, and the court reaffirmed its decision in Bertelmann v. Kahilina to the effect that the defeasance of the vested remainder in the daughters depended upon a condition subsequent, the payment to

each daughter of the sum of $5,000.00 *at the time and in the manner prescribed in the will.* (The italics are ours.)

The court held (see page 342) that the death of Catherine Scott, prior to the termination of the lease,

"rendered the condition subsequent, whereby the estate which vested in her should be divested, impossible of performance. There is no provision in the will whereby the estate so vested in Mrs. Scott should be divested in any mode or manner other than the one prescribed in the will itself, i. e., the payment to her of $5,000.00, a privilege granted to the sons, or one or more of them by the testator. That condition becoming impossible by the act of God is as though it were never made. The plaintiffs inherited from their mother the estate bequeathed to her by the will and vested in her as decided by the former decision of this court. That vested estate could only be defeated by a strict and literal performance of the condition prescribed."

Citing numerous authorities; and again, on page 343,

"We have examined a large number of decisions, both English and American, and find them all in harmony with the rules herein announced. It follows that the plaintiffs inherited from their mother the estate in the lands in controversy vested in her by the will of her father, freed from the condition subsequent whereby the same could be divested if their mother was now living. Under the conclusion at which we have arrived the sons or either of them, cannot now defeat the estate which vested in the mother of the plaintiffs in her lifetime by reason of the provisions of the said will, which descended to and vested in the plaintiffs."

The court further held that the privilege of buying out the interests of the daughters was a personal privilege that could be performed by the sons only and that personal privilege could not be assigned, hence the respondent, Mary N. Lucas, could not acquire that privilege.

The case of Scott v. Lucas was taken by Writ of Error to the Ninth Circuit Court of Appeals. See 239 Fed. 450.

That court affirmed the decision of the Supreme Court of the Territory of Hawaii, agreeing with our local court that the privilege of the sons to buy the interest of the daughters at a fixed price, was intended to be personal to the sons, and not transferable to another, and that therefore Mary N. Lucas could not by paying the heirs of Catherine Scott divest these minors of their estate in the lands. That being the case it was unnecessary for the court to consider whether the sons' right to acquire Catherine's interest ceased with Catherine's death as being thereby rendered impossible of performance.

Although the Ninth Circuit Court of Appeals did not specifically sustain the judgment of the Supreme Court of Hawaii on this phase of the case, an examination of the opinion of the Apellate Court indicates that that court had no fault to find with the rule laid down by our Supreme Court, but on the contrary it is highly evident that the Apellate Court agreed with the opinion of the lower court. The Appellate Court agreed with our Supreme Court in its two former judgments to the effect that the condition whereby the sons might divest the daughter's interests was a condition subsequent and that, page 456,

"Compliance with that condition was absolutely necessary before the estate of the daughters could vest in the sons, for it is apparent from the will that the testator did not intend that the daughters' estate should vest in

the sons *unless the conditions were fully and literally performed*", (Italics are ours.)

and again on page 457,

"Conditions subsequent, working a forfeiture of the estate conveyed should be strictly construed, as such conditions are not favored in law, and are to be taken most strongly against the grantor to prevent such forfeiture"—

and again quoting 30 Am. & Eng. Encl. of Law 802, the court said,

"Conditions subsequent are considered literally in order to save, if possible, the vested estate or interest. A contingency divesting a prior vested interest must happen literally."

And see the many authorities cited by the court in its opinion.

That the heirs of Catherine Scott cannot be divested of their estates by the payment to them of $5,000.00 or any other sum of money has been specifically and definitely settled by this court. It is true that, on appeal to the Ninth Circuit Court of Appeals, that court did not pass upon this phase of the question, but the fact remains, that the judgment of the Territorial Supreme Court on this question stands unreversed and, as far as that court is concerned, that judgment constitutes the law of this case.

Should the court have any doubt of the correctness of this doctrine and be of the opinion, notwithstanding the decision of the Territorial Supreme Court that this court may, under the pleadings in this case consider the question involved in that decision, we submit that

the judgment of the Territorial Supreme Court in Scott vs. Lucas was correct and should be followed by this Court.

In support of this contention we call the court's attention to the many cases cited by the Territorial Supreme Court in Scott vs. Lucas and to the cases cited by the Ninth Circuit Court of Appeals in 239 Fed. 450.

We, therefore, respectfully submit that, for the many reasons urged herein, the demurrer interposed on behalf of these respondents should be sustained.

Respectfully submitted,

E. A. MOTT-SMITH,
Attorney for Janet M. Scott, Rubena F. Scott and Bishop Trust Company, Limited, their Guardian.

Dated, Honolulu, Hawaii, April 30, 1925.